No. 86-940

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PACIFIC FIRST FEDERAL SAVINGS BANK,
PRICE WATERHOUSE and
KAPLAN, SMITH & ASSOCIATES, INC.,
Petitioners,

v.

WAYNE C. REMBOLD, KAREN D. REMBOLD,
DARRELL STEELE and LYLE SCHNEIDER,
Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondents purport to distinguish the decisions in *Harr v. Prudential Federal Savings and Loan Association,* 557 F.2d 751 (10th Cir. 1977) and *Craft v. Florida Federal Savings & Loan Association,* 786 F.2d 1546 (11th Cir. 1986) from the decision of the Ninth Circuit in this proceeding on the feeble basis that they, unlike the plaintiffs in *Harr* and *Craft, truly* rely on alleged misrepresentations in the subscription offering circular and that the petition for review mischaracterizes their complaint, which respondents include in the appendix to their brief.[1] Their contention has no merit.

[1] In their statement of the Question Presented, respondents suggest that the stock offering circular was issued "after" Pacific First's conversion from the mutual to stock form of ownership. However, as set forth in the complaint, the decision of the district court and the Ninth Circuit decision, the subscription offering circular was issued as a necessary part of, not after, the conversion. Respondents allege they bought their stock in the conversion; they are not post-conversion purchasers.

The complaint was properly characterized by the district court's finding that it "amounts to no more than a challenge to the conversion process as approved by the FHLBB" (Petition at 7-8). In reaching this conclusion, the district court had before it certified and undisputed copies of the subscription offering circular which, according to the complaint, failed to disclose information relating, for example, to the terms of the so-called "subsequent offering," *i.e.*, the public offering phase of the conversion. The district court thus was able to determine that the complaint, though phrased in terms of misrepresentation under the federal securities laws, actually was a challenge to the conversion process itself. Indeed, the respondents' allegations concerning the "subsequent offering" are virtually identical to those in *Craft*. While the Eleventh Circuit in *Craft* saw through those allegations and dismissed for lack of subject matter jurisdiction, the Ninth Circuit erroneously declined to address whether, in this case, a violation of the federal securities law was alleged in form only. Instead, the Ninth Circuit ruled it was sufficient that respondents "purport" to allege federal securities claims, regardless of the real nature of the pleading, as found by the district court. Federal jurisdiction should not be so freely extended where, as here, Congress has seen fit expressly to restrict jurisdiction.[2]

Respondents' second contention, that the Ninth Circuit's decision does not present a question of national importance and will have no effect on the savings and loan industry, cannot be taken seriously. Although respondents rely upon *Tcherepnin v. Knight*, 389 U.S. 332 (1967), in asserting that securities issued by savings and loans already are subject to the securities laws, they fail to point out that *Tcherepnin* involved withdrawable capital shares in a state-chartered association, a situation wholly

[2] The so-called "warning" in *Craft*, emphasized by respondents, that the Eleventh Circuit was not deciding whether jurisdiction exists where securities fraud "is properly alleged" (Opposition at 7), is inapposite. Because the Ninth Circuit, in this case, refused to consider whether respondents' pleading truly stated a claim for securities fraud, it also did not address whether jurisdiction exists where proper claims are stated. As discussed in the Petition at 15-16, the Ninth Circuit's failure to address the nature of the purported securities claims conflicts with the procedure followed by the Tenth and Eleventh Circuits in *Harr* and *Craft*.

inapposite to the conversion process involved in this case. *Tcherepnin* did not involve a federally-authorized, supervised and approved mutual-to-stock conversion, nor did it involve a statute by which Congress expressly deprived the district court of jurisdiction. It thus does not involve any of the concerns raised in this case or the problems of a federal industry subjected to extensive regulation and entrusted to the supervision of the FHLBB. Moreover, to the extent the Ninth Circuit decision "merely preserves . . . a reasonable opportunity for redress" (Opposition at 8), it contravenes Congress' express restriction and Congress' own determination of what is "reasonable" in the conversion context, and it constitutes an unwarranted extension of judicially-implied remedies.[3]

Respondents also characterize the petition for review as "forecast[ing] dire consequences" to the savings and loan industry and raising "hysterical predictions."[4] The financial condition of the savings and loan industry is a matter of public record, extensively reported in the media, as are the causes of the industry's problems and Congress' continuing concern.[5] Conversions, by which the "ownership" interests of depositors in the mutual form are converted to the equity interests of the new shareholders, are a "major means of building the net worth" needed by the industry. 49 Fed. Reg. 19000 (May 4,

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[3] Respondents also claim their requested relief does not seek a "modification or unwinding" of the conversion since they do not challenge the "price of the stock," but only seek "damages." This semantic difference is unconvincing. Respondents claim a right to rescind, which the FHLBB regulations denied to them, and/or a refund of the amount they allegedly overpaid. Indeed, if they are not challenging the price they paid, they would have no damages.

[4] Respondents suggestion that the Ninth Circuit's decision will have little, if any, impact on conversions is disingenuous. Indeed, on the heels of the Ninth Circuit's decision, and no doubt fueled thereby, counsel for respondents have filed a new lawsuit against petitioners on behalf of a new set of plaintiffs who allegedly acquired conversion stock. *See Shaw, et al.* v. *Pacific First Federal Savings Bank, et al.*, No. 87-59 PA (D. Oregon).

[5] *See, e.g., Administration To Push FSLIC Recapitalization; Officials Warn Of Liquidity Problems In Thrift System,* American Banker, Jan. 20, 1987, at 1; *Legislative Outlook Murky; Congress To Focus On Health Of FSLIC, Safety & Soundness And Consumer Protection,* BNA Banking Report, Jan. 5, 1987, at 24; *Sinking In A Sea Of Bad Loans; As Thrift Institutions Fail, Their Insurance Fund Is Running Low,* Time, Nov. 3, 1986, at 58.

1984). It cannot be gainsaid that the orderly functioning of the conversion process is a question of vital national significance at this time.

Respondents' opposition, in the final analysis, rests on their self-serving assertion that they should be allowed to undo a conversion in a manner prohibited by Congress because the issue presented for review is at an "early stage in the development of the case law." Yet, despite the more than 470 conversions which have occurred over the past ten years, respondents cite no case in which purchasers such as themselves have been allowed to use the federal securities laws in the manner they propose. The respondents' securities law claim was properly dismissed for lack of subject matter jurisdiction and the Ninth Circuit's decision to the contrary should be reviewed.

CONCLUSION

For the reasons set forth above and in the Petition, a writ of *certiorari* should be granted.

Respectfully submitted,

/s/ JAMES H. SCHROPP

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